LT JEN DATO' IR ISMAIL SAMION A

v.

MAJLIS ANGKATAN TENTERA & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[JUDICIAL REVIEW NO: R1-25-319-2008]
21 JANUARY 2010

ARMED FORCES: *Majlis Angkatan Tentera - Applicant seconded as* C
vice chancellor for three years before attaining age of compulsory retirement - Decision of Majlis to shorten/terminate secondment after age of compulsory retirement - Whether reg. 20(2)(b) Regular Forces (Pension, Gratuities and Other Benefits) Regulations 1982 applicable - Whether D
applicant legitimately expected to serve tenure as vice chancellor until expiry of secondment term - Whether Majlis acted unlawfully - Whether applicant deprived from making representations - Whether decision of Majlis based on correct legal procedure - Whether breach of natural justice

ADMINISTRATIVE LAW: *Judicial review - Application for -* E
Certiorari - Applicant seconded as vice chancellor for three years before attaining age of compulsory retirement - Decision of Majlis to shorten/terminate secondment after age of compulsory retirement - Whether reg. 20(2)(b) Regular Forces (Pension, Gratuities and Other Benefits) Regulations 1982 applicable - Whether applicant legitimately expected to F
serve tenure as vice chancellor until expiry of secondment term - Whether Majlis acted unlawfully - Whether applicant deprived from making representations - Whether decision of Majlis based on correct legal procedure - Whether breach of natural justice

The applicant had been in service with the Royal Malaysian Air G
Force. Before the applicant had attained the age of compulsory retirement on 22 November 2007, he was seconded to Universiti Pertahanan Nasional Malaysia ('UPNM') as the Vice Chancellor ('VC') for a period of three years from 17 January 2007 until 16 January 2010. The applicant had then signed the terms of H
appointment by secondment and contract after compulsory retirement as approved by the public services department. On 17 April 2008, the first respondent had decided to shorten the applicant's term of secondment as VC of UPNM and to retire the applicant from the armed forces pursuant to reg. 20(2)(b) of the I
Regular Forces (Pensions, Gratuities and Other Benefits)

A Regulations 1982 ('the 1982 Regulations') with effect from 17 January 2009. Pursuant to the decision of the first respondent, the third respondent *vide* its letter dated 4 July 2008 had informed the applicant that the applicant's period of secondment had been shortened with effect from 1 September 2008. The applicant
B contended that the respondents had acted *ultra vires* and had erred in law in their decision to shorten the applicant's period of secondment and to have approved his retirement premised on reg. 20(2)(b) of the 1982 Regulations since the applicant had already attained the compulsory age of retirement on 22 November 2007.
C The applicant had thus filed an application for judicial review under O. 53 of the Rules of the High Court 1980 for the following reliefs, *ie*, (i) an order of *certiorari* to quash the decision made by the first respondent on 17 April 2008 (ii) an order of *certiorari* to quash the decision of the third respondent *vide* its
D letter dated 4 July 2008 and (iii) a declaration that the first and third respondents had acted unlawfully and/or in excess of their powers.

Held (allowing applicant's application with costs):

E **(1)** At the time the decision was made by the first respondent to retire the applicant under reg. 20(2)(b) of the 1982 Regulations, the applicant had already attained the age of compulsory retirement and therefore the said reg. 20(2)(b) was
F not applicable to the applicant. (para 18)

(2) At the time the applicant was appointed to be VC of UPNM, he was still in the service of the armed forces. He had approximately ten or eleven months of service before going on compulsory retirement. The first respondent had taken steps to
G extend his service by contract with the approval of the public services department. As such, the applicant could legitimately expect to be permitted to serve his tenure as VC till the expiry of his contract. (para 20)

H **(3)** The applicant was not given any prior indication that the first respondent had contemplated to retire him and to terminate his tenure as VC. As such, there had been a breach of the rules of natural justice when the applicant was deprived of his opportunity to have made representations to the first

I

respondent as to why he ought to be allowed to complete his contractual tenure as VC of UPNM. The first respondent had also failed to consider the applicant's proprietary right to livelihood. (paras 19 & 20)

(4) The court was only concerned with the legality of the decision making process and not the eventual decision. The first respondent had committed an error of law and also erred in its decision to retire the applicant under reg. 20(2)(b) of the 1982 Regulations. The decision of the third respondent to terminate the applicant's tenure as VC was similarly flawed since it was based on the decision of the first respondent. (paras 21-22)

[Application allowed with costs of RM3,000]

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Breen v. Amalgamated Engineering Union [1971] 2 QB 175 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Dr Chandra Muzaffar v. Universiti Malaya [2002] 2 CLJ 448 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 CA ***(refd)***

M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor [2005] 3 CLJ 778 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

R v. Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd & Ors & related applications [1990] 1 All ER 91 ***(refd)***

R v. North and East Devon Health Authority ex parte Coughlan (Secretary of State for Health & Anor intervening) [2000] 3 All ER 850 ***(refd)***

Rajasingam VS Rasiah v. Government of Malaysia [2002] 1 MLJ 7 ***(refd)***

A *Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC* ***(refd)***
Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No 2) [1966] 1 LNS 185 HC ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***
B *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 ***(refd)***

Legislation referred to:
C Armed Forces Act 1972, s. 9
Federal Constitution, art. 40
Regular Forces (Pension, Gratuities and Other Benefits) Regulations 1982, reg. 20(2)(b)
Rules of the High Court 1980, O. 53

D *For the applicant - Stanley Sinnappen; M/s Vazeer Akbar Majid & Co*
For the respondents - Shamsul Bolhassan SFC; AG's Chambers

Reported by Kumitha Abdul Majid

E

JUDGMENT

Aziah Ali J:

F **[1]** This is an application for judicial review pursuant to O. 53 of the Rules of the High Court 1980 ("the RHC"). The two decisions that are the subject matter of this application are:

(a) the decision of the 1st respondent to shorten/terminate the applicant's secondment as the Vice Chancellor of Universiti
G Pertahanan Nasional Malaysia and to retire the applicant under reg. 20(2)(b) of the Regular Forces (Pension, Gratuities and Other Benefits) Regulations 1982, and

(b) the decision of the 3rd respondent to terminate the applicant's
H secondment as the Vice Chancellor of Universiti Pertahanan Nasional Malaysia at the request of the 2nd respondent.

[2] The applicant contends that the decision of the 1st and 2nd respondents to shorten the period of the applicant's secondment and approve his retirement is void for illegality, irrationality and
I procedural and substantive impropriety. The applicant says that

the respondents had acted *ultra vires* their powers and abused their powers, failed to comply with the rules of natural justice, failed to act fairly, and took irrelevant considerations into account when making the said decision, that the said decision constitutes a breach of the applicant's legitimate expectations, and that the said decision was made in bad faith.

[3] By way of this action the applicant seeks primarily the following reliefs:

(a) an order of *certiorari* to quash the decision made by the 1st respondent at their 468th meeting on 17 April 2008 and revised at their 469th meeting that the term of secondment of the applicant as Vice Chancellor of Universiti Pertahanan Nasional Malaysia be shortened and terminated on 1 September 2008 and the applicant be required to retire from the armed forces pursuant to reg. 20(2)(b) of the Regular Forces (Pension, Gratuities and Other Benefits) Regulations 1982 with effect from 17 January 2009;

(b) an order of *certiorari* to quash the decision made by the 3rd respondent *vide* letter dated 4 July 2008 to shorten the applicant's term of secondment as Vice Chancellor of Universiti Pertahanan Nasional Malaysia with effect from 1 September 2008;

(c) a declaration that the 1st and 3rd respondents had acted unlawfully and/or in excess of their powers.

Background Facts

[4] The applicant commenced service with The Royal Malaysian Air Force on 9 June 1970. On 22 November 2007 the applicant attained the age of compulsory retirement.

[5] On or about 17 January 2007, pursuant to the decision of the 1st respondent at their 456th Meeting on 16 February 2007, the applicant was seconded to Universiti Pertahanan Nasional Malaysia ("UPNM") as Vice Chancellor ("VC") for a period of three years from 17 January 2007 until 16 January 2010. It was also decided by the 1st respondent at the said meeting that the applicant's term of service would be contractually extended by two years, four months and 13 days to enable the applicant to complete his term of secondment as Vice-Chancellor of UPNM and to subsequently complete rehabilitation training before leaving the armed forces on 17 January 2010.

[6] By way of a letter dated 17 January 2007 from the Ministry of Higher Education (the 3rd respondent), the applicant was appointed as the VC of UPNM for the said period of three years from 17 January 2007 until 16 January 2010 (exh. IS1). On 30 August 2007, the applicant signed the terms of appointment by secondment and contract after compulsory retirement (syarat-syarat pelantikan secara pinjaman dan kontrak selepas bersara) as approved by the Public Services Department (exh. IS2) ("the said contract"). The applicant took office as VC of UPNM on or about 17 January 2007.

[7] On 17 April 2008 at the 468th Meeting of the 1st respondent (as revised at their 469th Meeting on 27 May 2008 and upheld at their 473rd Meeting on 15 September 2008), the 1st respondent decided that the applicant's term of secondment as VC of UPNM be shortened and the applicant is to retire from the armed forces pursuant to reg. 20(2)(b) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ("the 1982 Regulations") with effect from 17 January 2009.

[8] By letter dated 12 June 2008 issued by the 2nd respondent to the 3rd respondent and copied to the applicant, the 2nd respondent informed the 3rd respondent that the 1st respondent at its meeting on 27 May 2008 has decided to shorten the applicant's period of secondment due to the applicant's lengthy period of service in the armed forces and to make way for other officers of the armed forces (exh. IS3). The letter reads as follows:

> **Pemendekkan/Penamatan Pertukaran Sementara Y.Bhg. Leftenan Jeneral Dato' Ir. Ismail bin Samion, Naib Canselor, Universiti Pertahanan Nasional Malaysia Dan Cadangan Pegawai Pengganti**
>
> Dengan hormatnya saya menjemput perhatian Y.Bhg. Datuk kepada perkara di atas.
>
> 2. Seperti mana pihak Y.Bhg. Datuk sedia maklum bahawa Y.Bhg. Leftenan Jeneral Dato' Ir. Ismail bin Samion telah dipinjamkan sebagai Naib Canselor Universiti Pertahanan Nasional Malaysia (UPNM) mulai 17 Januari 2007 hingga 16 Januari 2010. Walau bagaimana pun, Majlis Angkatan Tentera (MAT) yang bersidang pada 27 Mei 2008 telah memutuskan untuk memendekkan tempoh pinjaman ini kerana tempoh perkhidmatan beliau dalam ATM yang begitu lama dan bagi memberi laluan kepada pegawai-pegawai ATM yang lain.

3. Untuk makluman Y.Bhg. Datuk, Y.Bhg. Leftenan Jeneral Dato' Ir. Ismail bin Samion akan bersara daripada Perkhidmatan ATM pada 17 Januari 2009. Beliau akan menghabiskan cuti tahunan terkumpul sebelum bersara mulai 1 September 2008 hingga 16 Oktober 2008 dan dimasukkan ke dalam Senarai Latihan, Peralihan dan Kontingensi bagi membolehkan jawatannya diisi dan seterusnya menjalani Latihan Peralihan selama tiga bulan mulai 17 Oktober 2008 hingga 16 Januari 2009 sebelum bersara. Sehubungan itu, sukacita sekiranya pihak Y.Bhg. Datuk dapat menamatkan pertukaran sementara Leftenan Jeneral Dato' Ir. Ismail bin Samion sebagai Naib Canselor, Universiti Pertahanan Nasional mulai 1 September 2008.

4. Untuk makluman Y.Bhg. Datuk, Majlis Angkatan Tentera telah bersetuju mencadangkan supaya Y.Bhg. Leftenan Jeneral Dato' Pahlawan Hj Zulkifli bin Zainal Abidin dilantik sebagai Naib Canselor UNPM yang baru mulai 1 September 2008 bagi menggantikan Y.Bhg. Lt Jen Dato' Ir. Ismail bin Samion. Bersama-sama ini disertakan dokumen-dokumen berikut mengenai Y.Bhg. Leftenan Jeneral Dato' Pahlawan Hj Zulkifli bin Zainal Abidin untuk makluman dan tindakan Y.Bhg. Datuk selanjutnya.

[9] Consequently the 3rd respondent *vide* letter dated 4 July 2008 informed the applicant that pursuant to the decision of the 1st respondent, the 3rd respondent has shortened his period of secondment with effect from 1 September 2008 (exh. IS4). The letter reads as follows:

Y.Bhg. Dato',

Pemendekkan Tempoh Pinjaman Sebagai Naib Canselor Universiti Pertahanan Nasional Malaysia (UNPM)

Dengan hormatnya saya menarik perhatian Y.Bhg. Dato' kepada perkara di atas.

2. Adalah dimaklumkan bahawa Kementerian ini telah menerima surat daripada Kementerian Pertahanan ruj. KP(S)810/30/13 bil.(12) bertarikh 12 Jun 2008 yang memaklumkan bahawa keputusan Majlis Angkatan Tentera (MAT) untuk memendekkan tempoh pinjaman Y.Bhg. Dato' sebagai Naib Canselor UNPM **berkuatkuasa mulai 1 September 2008.**

3. Sehubungan itu, selaras dengan Seksyen 9(1) dan (7) Jadual Pertama Akta Universiti dan Kolej Universiti 1971 (Akta 30) yang dibaca secara bersama dengan Seksyen 47 Akta Tafsiran 1948 dan 1967 (Akta 388); dengan perenggan 14, Syarat-Syarat Pelantikan Secara Pinjaman Y.Bhg. Dato' sebagai Naib Canselor UNPM yang telah diluluskan oleh Jabatan Perkhidmatan Awam dalam

A suratnya ruj. JPA(S)354/2/1 Klt. 13(15) bertarikh 22 Ogos 2007 dan ditandatangani oleh Y.Bhg. Dato' pada 30 Ogos 2007, Y.B. Menteri Pengajian Tinggi telah bersetuju untuk memendekkan tempoh pinjaman Y.Bhg. Dato' sebagai Naib Canselor UNPM berkuatkuasa pada 1 September 2008.

B **[10]** The applicant responded to the 3rd respondent by letter dated 11 July 2008 stating that the decision of the 1st respondent to shorten his period of secondment is contrary to the terms of his appointment (exh. IS5). Another letter dated 24 July 2008 was sent to the 1st respondent states that the decision of the 1st C respondent to shorten his period of secondment is not in accordance with law. The 1st respondent replied *vide* letter dated 7 August 2008 (exh. IS7) stating amongst others as follows:

(a) that the decision to shorten his period of secondment and to D approve his retirement with effect from 17 January 2009 under reg. 20(2)(b) of the Regular Forces (Pension, Gratuities and Other Benefits) Regulations 1982 ("the 1982 Regulations") was due to special circumstances;

E (b) that the applicant's retirement was due to his lengthy service in the armed forces and to give way to other senior officers of the armed forces;

(c) that on 17 January 2009 the Yang DiPertuan Agong has consented to the 1st respondent's decision; F

(d) that his date of retirement is 17 January 2009;

(e) that the 2nd respondent has complied with para. 14 of the contract by giving the requisite 30 days' notice of termination.

G **[11]** For the applicant it is contended that the 1st and 2nd respondents erred in law in their decision to shorten the applicant's period of secondment and to approve his retirement premised on reg. 20(2)(b) of the 1982 Regulations as at the material time reg. 20(2)(b) is not applicable since the applicant has H attained the compulsory age of retirement on 22 November 2007. The respondents have failed to address the applicant's contention that they had erred in law in making the decision based on reg. 20(2)(b) and to demonstrate that the decision was made in accordance with law. Therefore the court is entitled to conclude I that the decision was not made in accordance with the law (*Datuk*

Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248; *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771). Counsel submits that no sensible or reasonable authority could have made the said decision (*Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935; *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300).

[12] It is submitted that the 1st and 2nd respondents erred in law by taking into account wholly irrelevant considerations, namely the lengthy period of the applicant's service and to make way for other officers, which are not special circumstances (*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748). The reasons given for the decision are wholly irrelevant and unjustifiable as a basis for depriving the applicant of his livelihood. There were no allegations of national security, public interest or misconduct whatsoever against the applicant to warrant termination of the Contract (*Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; *R v. North and East Devon Health Authority ex parte Coughlan (Secretary of State for Health & Anor intervening)* [2000] 3 All ER 850; *R v. Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd & Ors & related applications* [1990] 1 All ER 91, per Bingham LJ). It is further submitted that the reasons for the said decision were so tenuous and vague as to severely prejudice the applicant's ability to make proper and complete representations in response and have rendered the complaints provisions under the Armed Forces Act 1972 meaningless (*Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390).

[13] Counsel submits that the respondents do not have the right to summarily terminate the said contract merely by giving the applicant the requisite notice. There was procedural unfairness as the applicant was deprived of the right to a hearing and to his livelihood (*B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224; *M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor* [2005] 3 CLJ 778). The applicant has a legitimate expectation that he

would hold the office of VC of UPNM until the expiry of the contract on or about 16 January 2010. He has a legitimate expectation that his term of secondment would subsist till then (*Dr Chandra Muzaffar v. Universiti Malaya* [2002] 2 CLJ 448). The respondents have unlawfully and unfairly deprived the applicant of his legitimate expectation that he would be allowed to complete the contract.

[14] It is submitted that the decision of the respondents was actuated by bad faith and is therefore defective for the following reasons:

(a) the applicant was never notified that the 1st respondent was considering his early retirement and/or shortening his term of secondment;

(b) by keeping the applicant in complete ignorance of the respondents' actions and presenting their decision to the Yang DiPertuan Agong for approval, the applicant was deprived of any chance of presenting his case and/or persuading the 1st respondent to reconsider its decision which constitutes a grave breach of natural justice;

(c) there was a deliberate attempt to deprive the applicant of his legitimate expectation that the contract would be performed in its entirety and deprive him of his constitutional right to a livelihood;

(d) the decision was made notwithstanding that reg. 20(2)(b) does not apply to the applicant;

(e) the reasons given for the 1st respondent's decision are so tenuous and implausible as to strongly suggest that the said decision is cloaked in bad faith;

(f) there is no suggestion that the decision was motivated by considerations of national security, public interest or policy, or any misconduct on the applicant's part.

It is submitted that in view of the fact that the termination of the contract by the 3rd respondent was made pursuant to the 2nd respondent's express request and as the termination was premised on the wrongful decision of the 1st and 2nd respondents, therefore the termination of the contract by the 3rd respondent is void.

[15] For the respondents, learned Senior Federal Counsel raised the issue of justiciability. It is submitted that the jurisdiction to decide on the compulsory retirement of the applicant's service under reg. 20(2) is not with the 1st respondent but is the sole prerogative of the Yang DiPertuan Agong. Similarly it is submitted that the decision to cancel any commission under s. 9 of the Armed Forces Act 1972 ("the Act") is the prerogative and sole discretion of the Yang DiPertuan Agong *(Rajasingam a/l VS Rasiah v. Government of Malaysia* [2002] 1 MLJ 7). The function of the 1st respondent under s. 9 is only to make a recommendation to the Yang DiPertuan Agong. Therefore, the decision to retire the applicant is not justiciable. In reply, counsel for the applicant agrees that the exercise by the Yang DiPertuan Agong of His Majesty's prerogative powers are not amenable to judicial process (*Council of Civil Service Union & Others v. Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374). However, it is submitted that the decision of the Yang DiPertuan Agong made in his official capacity, save for the exercise of prerogative powers, are justiciable as such decisions are made on the advice of the Cabinet and/or the relevant Minister as provided for under art. 40 of the Federal Constitution. His Majesty's decision is therefore the decision of the Government and susceptible to judicial review (*Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2)* [1966] 1 LNS 185; *Teh Cheng Poh v. Public Prosecutor* [1978] 1 LNS 202).

[16] Counsel submits that in the present case the role of the Yang DiPertuan Agong in relation to the armed forces is entirely symbolic as the titular Supreme Commander of the armed forces. His Majesty was therefore acting in his official capacity. The present application is to review the decision of the 1st and 2nd respondents. The 1st and 2nd respondents in their affidavits in reply aver that the 2nd respondent has the discretion and power to terminate and/or shorten the applicant's appointment and has sought to justify their decision. Therefore to now raise the issue of justiciability is to make a mockery of the stand taken by the 1st and 2nd respondents.

Decision

[17] I am of the view that the cancellation of commission under s. 9 raised by the learned Senior Federal Counsel is not a relevant issue in this application. The applicant is not challenging the cancellation of his commission. The issue is the decision taken by

the 1st respondent to retire the applicant under reg. 20(2)(b) of the 1982 Regulations which counsel for the applicant submits is an error based on the contention that reg. 20(2)(b) does not apply to the applicant. It is further contended that there has been a breach of procedural fairness in the termination of his tenure as VC due to a breach of the rules of natural justice and procedural fairness and the deprivation of the applicant's legitimate expectation. Further it is contended that the 1st respondent has committed errors of law by taking into consideration wholly irrelevant matters in making its decision. It is counsel's contention that viewed in totality there is *mala fide* on the part of the 1st respondent in making the decision.

[18] Regulation 20(2)(b) provides as follows:

> Regulation 20 Compulsory retirement of officers.
>
> (1) ...
>
> (2) The Yang di-Pertuan Agong may require an officer to retire from the service -
>
> (a) ...
>
> (b) under special circumstances if he is of the rank of Brigadier General or above even though he has not reached the compulsory age of retirement stipulated in paragraph (1) or optional age of retirement stipulated in sub-paragraph (a) above; ...

It is not disputed that at the time the decision was made by the 1st respondent to retire the applicant under reg. 20(2)(b) the applicant has already attained the age of compulsory requirement. Based on the clear words of reg. 20(2)(b) the said provision does not apply to the applicant. Therefore I agree with counsel for the applicant that the 1st respondent has erred in its decision to 'retire' the applicant under reg. 20(2)(b). Consequently the decision of the 1st respondent is flawed and of no effect.

[19] The evidence shows that the applicant was not given any prior indication that the 1st respondent contemplated to 'retire' him and to terminate his tenure as VC. He was therefore deprived of the opportunity to make representations as to why the 1st respondent ought to reconsider its decision. "Where a person has some right or interest, or legitimate expectation of which it would

not be fair to deprive him without a hearing or reasons given, then these should be afforded him accordingly, as the case may demand" (per Lord Denning in *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175 at 191). In the case of *Dr Chandra Muzaffar v. Universiti Malaya (supra)* KC Vohrah J (as he then was) referred to the case of *Council of Civil Service Unions v. Minister for Civil Service (supra)*. In that case Lord Diplock stated at p. 408 that for a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either:

(i) he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do unless there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[20] In the present case at the time the applicant was appointed to be VC of UPNM, he was still in the service of the armed forces. He had approximately 10 or 11 months of service before going on compulsory retirement. In spite of this fact the 1st respondent not only decided to appoint him as the VC but took steps to have his service extended by contract with the approval of the Public Services Department. In the circumstances, I am of the view that the applicant can legitimately expect to be permitted to serve his tenure as VC till the expiry of his contract. In the case of *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; [2009] 1 LNS 1145 Raus Sharif JCA (as His Lordship then was) said:

> ... the expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edn. paras 8-37.

Despite para. 14 of the contract on the giving of 30 days' notice, I agree with counsel for the applicant that there has been a breach of the rules of natural justice when the applicant was deprived of any opportunity to make representations to the 1st

respondent as to why he ought to be allowed to complete his contractual tenure as VC of UPNM. The 1st respondent has also failed to take into account the relevant consideration of the applicant's proprietary right to livelihood.

[21] I agree with counsel for the applicant that the reasons advanced by the 1st respondent to justify its decision to terminate the applicant's tenure as VC are tenuous. As submitted by counsel for the applicant and with whom I agree, the applicant's length of service is a fact known to the 1st respondent at the time the decision to appoint him as VC was made. The fact that there are other senior officers is also a known fact. The evidence suggests that the 1st respondent has been less than forthright in its decision to terminate the contract.

[22] The court is only concerned with the legality of the decision making process and not the eventual decision. In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197 Mahadev Shankar JCA said:

> … an error of law would be disclosed if the decision maker asks himself the wrong questions, or takes into account irrelevant considerations, or omits to take into account relevant consideration, or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

Having considered the evidence and the submissions I find that the 1st respondent has committed an error of law in its decision to retire the applicant under reg. 20(2)(b) when the applicant has already attained the age of compulsory retirement. Further there has been a denial of the applicant's legitimate expectation and a breach of procedural fairness when the applicant was deprived of the opportunity to make representations as to why his tenure as VC ought not to be terminated prematurely. As the decision of the 3rd respondent to terminate the applicant's tenure as VC is based on the decision of the 1st respondent, therefore the decision of the 3rd respondent is similarly flawed. For the reasons aforementioned I allowed the application with costs of RM3,000 to the applicant.